

**“What impediments are there to the criminalisation of corporate misconduct?”**

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## Introduction

A company may have a legal personality and it is common that this is asserted in the courts, however, where a company has misbehaved in some way, it is less common that it will be treated as an individual in the criminal courts. A reason for this could be that,

*“Lawyers familiar with both criminal law and company law are relatively few in number.”<sup>1</sup>*

This though is just one of many reasons put forward to explain the resistance to the criminalisation of corporate misconduct which will be examined in a moment.

Interest in the area has grown over the last twenty years due to the increased globalisation of many corporations and the more frequent occurrence of potentially lethal corporate misconduct. Some more famous examples of these would be the Piper Alpha oilrig, Bhopal chemical plant disaster, Exxon Valdez oil spill, Herald of Free Enterprise shipping disaster and the Paddington Rail Crash in October of 1999. Within the last few weeks even, questions have been asked over the potential criminal negligence of TRANSCO in relation to a recent domestic gas explosion in the UK.

As the world of business ever increasingly revolves around risk taking and cost cutting, it doesn't appear to be long before the full weight of the criminal law is unleashed upon the somewhat privileged world of the corporation. The question begs though, what barriers are there to this step being taken?

## Impediments to Criminalisation

There are many impediments to the criminalisation of corporate misconduct and these are outlined below. Initial problems that are faced automatically revolve around a lack of consensus upon the correct way in which to proceed on the issue, through questions on whether to prosecute companies, how to prosecute companies and how to punish companies each have separate conflicting discussions surrounding them. More practical issues too though follow with the consideration of the differences between civil and criminal laws, in the UK and the problems associated with collecting information from companies and also in considering the many anti criminalisation views and opinions all of which serve to block increasing demands for change.

### ***Civil or Criminal Liability?***

#### Theoretical Issues

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<sup>1</sup> Eva Lomnicka – reviewing “Criminal Law in the Company Context” by Janet Dine, 2 WebJCLI 1996

A major impediment to the criminalisation of corporate misconduct is the fact there is as yet no clear consensus as to whether or not the criminalisation of corporate misconduct is preferable to more traditional civil approaches. The question of civil or criminal liability is both a procedural and political question, the answer to which is likely to depend upon how harshly a person believes a company should be treated if it is alleged to have conducted its affairs in an erroneous manner. This in turn though is impossible to answer in an unbiased fashion since those in companies would reject a more criminal approach and victims would undoubtedly advocate tougher sanctions. A writer once wrote that,

*“The necessity for corporate criminal liability awaits demonstration.”*<sup>2</sup>

The reality today is somewhat different, however, as the notion of corporate misconduct gains a higher public profile, and is now seemingly occurring more frequently and on a larger scale than ever before, it becomes harder to justify the reliance on civil liability. As was recently pointed out,

*“With such power must come responsibility. Just as individuals owe a duty not to harm or injure others in society without justification, so too do companies owe a duty not to poison our water and food, not to pollute our rivers, beaches and air, not to allow their workplaces to endanger the lives and safety of their employees and the public, and not to sell commodities, or provide transport, that will kill or injure people.”*<sup>3</sup>

This though, would appear to be stating the obvious and if it were a simple matter, it is likely that it would now be common place to prosecute companies. The impediments or barriers to doing so are plentiful but due to a growing dissatisfaction with existing regulatory and self governance methods and the increased occurrence of major disasters outlined above, it is now more necessary than ever to begin to overcome the difficulties faced.

The difference between losing a civil case and losing a criminal case may not differ financially but the stigma attached to losing a criminal case could heavily damage a company’s credibility and reputation. In a sense, its corporate image or good social standing is potentially under threat. It is this aspect which means that many in companies and the companies themselves would prefer that the details of their transgressions remain in the civil courts instead of criminal ones. Persuading them to change their minds could be one of the greatest barriers of all.

## Procedural Issues

One of the most significant differences between criminal and civil liability is the burden of proof required to achieve a verdict of guilty. In civil cases, the verdict is based simply on the balance of probability whereas in criminal cases, a party’s guilt must be proven beyond all reasonable doubt which is a far greater requirement and one which would be much harder to meet. It is conceivable that more results will arise from civil cases involving companies than from criminal ones and this could, as it

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<sup>2</sup> Smith, 1996, p190

<sup>3</sup> “Corporate Culpability” by CMV Clarkson 1998, 2 WebJCLI

already has done, only serve to discourage criminal prosecutions of companies. While this does appear to be a major bridge to cross, it can work to the benefit of the company and as such may be fairer and more just. It could though make it a lot easier for companies to escape liability by hiding their activities sufficiently well enough to cause the prosecution difficulties in establishing that beyond all reasonable doubt it is the company and not an individual who is guilty.

### ***The humanisation of the corporation***

Some of the more commonly cited impediments are in relation to the way in which the courts perceive a company. A company can be humanised in several ways and, as mentioned above, one of these is where the corporate veil is lifted to expose the exact individuals responsible for actions, a second is where the individuals at the top of the company through their own actions represent the mind and opinion of the company<sup>4</sup> and a third is where the company itself as a legal fiction has its own distinct opinion illustrated by internal and external documents, its corporate ethos and other such sources.

A company, if it chooses to is capable of conducting its affairs in an extremely secretive manner. It is also capable of pinning the blame upon one person whom it could hire as a kind of “prison-bound director” who would receive a significant salary in return for detracting blame from the company itself. It is aspects like this, which make any company a formidable character to take on a criminal case against.

There are many problems involved in attempting to treat a company as if it were an individual human. By lifting the corporate veil it is possible to examine the individual actions of each person in the company and indeed, an individual in a company found to have committed a criminal offence would almost certainly be criminally liable.<sup>5</sup> It is though, continually possible that a company will treat an individual as a scapegoat for an offence which was committed by the company in the broader sense.

In considering corporate misconduct, that is misconduct by companies, rather than individuals, it is increasingly being recognised that a company is a different kind of organisation, one which in many ways is almost a living organic entity and as such should be treated as if it were so. As James Gobert illustrates,

*“When a crime occurs in the course of business, it is likely to be the result of a breakdown in more than one sphere of the company’s operation. Policies may be misguided in conception, inadequately*

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<sup>4</sup> The Identification Doctrine

<sup>5</sup> For a more detailed discussion of this and vicarious liability, see “Corporate Criminal Liability: What Purpose Does it Serve?” by VS Khanna in 109 Harvard Law Review, May 1996, 1477.

*supervised, and incompetently carried out. To capture the full extent of a company's wrongdoing would require an aggregating of these failures.*"<sup>6</sup>

However, in *R v HM Coroner for East Kent, ex parte Spooner*,<sup>7</sup> the notion that several innocent acts could combine to form an illegal one was rejected by the courts.<sup>8</sup>

More importantly though is the notion that we should attempt to find fault within the company by treating it as a whole entity, whose intentions can be illustrated by the policies which it has adopted. This has proven to be far easier in smaller companies<sup>9</sup> than in much larger ones who can use various methods of devolved decision making and generally pass the buck from department to department to avoid releasing the truth. The answer may lie in examining the nature of a company, or as Celia Wells puts it,

*"Corporate liability is thus dependent on an anthropomorphic view of company structure"*<sup>10</sup>

She illustrates this point by reference to *Tesco Supermarkets Ltd v Natrass*<sup>11</sup> in which the actions of those at the top of the company were held to represent the actions of the whole company. It did this through examining the word 'manager' in s20 of the Trade Descriptions Act 1968 which it held referred to a person managing the affairs of the company and could not be construed as referring to an individual branch manager. It could therefore be that the directors, company secretary and those at the top of the company's actions are taken to be the actions of the entire company.

These problems, or impediments, which would inevitably be encountered in trying to bring the actions of companies within the terms of criminal justice systems traditionally, aimed at punishing individuals. The huge problem facing the legal systems is illustrated most clearly in the academic writing on the matter and in particular by CMV Clarkson in his article "Corporate Culpability"<sup>12</sup> where he demonstrates no less than seven possible "Mechanisms of Corporate Culpability". Of these, he suggests that the creation of a corporate mens rea doctrine to act as a kind of legal fiction is possibly the best way forward. As he illustrates,

*"If the corporate culture permitted or encouraged the wrongdoing, it may be easy to infer that the corporate body itself must have foreseen the possibility of the harm occurring ... or that it has created an obvious and serious risk of the wrong resulting ... or that the consequence was virtually certain to occur from which intention may be inferred."*<sup>13</sup>

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<sup>6</sup> James Gobert, "Corporate Criminality: New Crimes for the Times" – Criminal Law Review 1994 at p722

<sup>7</sup> 1989 88 Cr App R10

<sup>8</sup> More recently though, it has been suggested that such rejection was premature. See the Herald of Free Enterprise Case.

<sup>9</sup> See for example, *Kite and Others*, *The Independent*, 9 December 1994

<sup>10</sup> Celia Wells in "Manslaughter and Corporate Crime" at 139 *New Law Journal Pt II*, at p931.

<sup>11</sup> 1972 AC 153

<sup>12</sup> 1998 2WebJCLI

<sup>13</sup> CMV Clarkson in "Corporate Culpability" 1998 2WebJCLI at page 10 of 14

This involves a kind of more distant view of the company as one single entity ignoring the actions of those at the top but using all sorts of sources both internally and externally to try and establish the mind of the company.

With all things considered, the development of the law in this area will be impeded by the gross lack of consensus on the correct approach to adopt. Each of the above attempts to transport the company into the position of an individual in the court only serves to show that the problems faced in deciding which path to take are extremely complex. No answers can as yet be provided but the general consensus does seem to suggest that the older methods of the identification doctrine and the perceptions of the company itself are increasingly naive and outdated.

### ***Different approaches to the Criminal Law in the UK***

Company law in the UK is essentially national law differing very little between England and Scotland. This leads to greater certainty in the markets and more unified trading practices. Criminal law, on the otherhand, is not the same both north and south of the border and it may be that Scotland will develop in a different manner to England. For example, in 1988, BP was fined £750,000 by the High Court in Edinburgh following the deaths of three of its employees.<sup>14</sup> Other actions around the country have resulted in much lower fines. A better example of the differences is the fact that the term ‘manslaughter’ is alien to Scots Law where the phrase ‘culpable homicide’ instead is used. Procedural and substantive differences abound and may lead to significantly different approaches in each legal system. This may not as such be a difficulty, more an oddity that takes a little getting used to.

### ***Deterrence or Punishment – How to sentence a company.***

Assuming that it is established that the criminalisation has overcome the above barriers, any supporter of this is automatically faced with the task of examining how far this would operate in practice. The concept of sentencing is generally perceived to be linked to the aim which it is hoped will be achieved as a result of penal sanctions. In the case of a company, both prevention of future offences and deterrence of initial offences must surely be rated highly. However, others would also prefer the company to be punished for its wrongdoing through fining or extensive public humiliation. As with all crimes, rehabilitation may also be necessary but how do you rehabilitate a company? More modern punishments may be necessary for instance a meeting with community representatives from the area of society, which it has harmed, wherein it can apologise, explain its actions and seek a peaceful and satisfactory solution to the issue. Overall, this mixture of deterrence, punishment, rehabilitation and reconciliation must aim to prevent future crimes occurring through preventative measures.

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<sup>14</sup> Guardian, March 22<sup>nd</sup> 1988

If, as James Gobert aptly points out,<sup>15</sup> the company truly epitomises the “bad man”<sup>16</sup> in that it obeys the law solely through a desire to avoid the consequences that may befall him and not because it is the right thing to do, then the corporation is ideally suited to preventative measures such as imprisonment, fines and negative advertising.

Conceptually, it is impossible to imprison a company for defining who exactly encompasses the company would cause enough problems in its own right. As has often been commented, a company has “no soul to be damned and no body to be kicked”<sup>17</sup> However, as many now recognise,

*“modern companies can be regarded as having both bodies and souls that, through the censure and stigma of punishment, can be kicked and damned in the hope of inculcating corporate conscience.”*<sup>18</sup>

Individual blame is but one aspect of corporate punishment, the other is a more collective approach, whereby the entire company or parts thereof are punished instead of singling out an individual to take the blame. This method although extremely complicated may lead to the desired results.

One problem with the punishment is that proportionality may suffer as a court attempts to deter others from similar activities. A company may be made an example of to the detriment of its shareholders and innocent employees. A small fine could be considered simply a necessary business expense by the company whereas a large fine could lead to financial problems which would hit the shareholders and the employees hardest.

Aside from imposing fines, another option is to attack the corporate image of the company. As far as the public perception of a company is concerned, there is a growing tendency to blame an entire company for the actions of a handful of its employees. For example, shoddy service by a cashier in a McDonalds Restaurant may prompt a damning criticism of the whole chain where in fact an individual is to blame. Corporations are often to blame for this image than anyone else. For years, the idea of the corporate personality has been pushed into our minds by companies in an attempt to build up their own individual reputation, honour and image. The companies will then in turn hold this in high regard and strive to protect it all costs for it is an effective way of maximising profits and gaining customers.

A court by ordering a company to engage in negative publicity and also preventing it from countering this with positive publicity for a period of time could have profound consequences. Other punishments are always possible to envisage and consider the effects of. A campaign of negative publicity could

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<sup>15</sup> In “Controlling Corporate Criminality: Penal Sanctions and Beyond” – 1998 2WebJCLI Page 1 of 19

<sup>16</sup> Oliver Wendell Holmes views on the correct way to envisage the law.

<sup>17</sup> Edward, First Baron Thurlow – referred to in “No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment” Coffee J – 1981 79 Michigan Law Review 386.

<sup>18</sup> CMV Clarkson in “Kicking Corporate Bodies and Damning their Souls” in 59 Modern Law Review 1996 at page 557.

have varying repercussions. A company could lose all its customers, or suppliers, its workforce could go on strike or resign in protest and so on. It could in effect have the same stigma, which would already be associated with it through engaging in criminal proceedings magnified tenfold.

For an individual, liberty is the most prized aspect of life but for a company, its financial position is certainly most important. Attack this and a company will listen. However, by attacking this, its employees could be adversely affected, as too could its shareholders. It may be possible to argue that only the directors should be held to account for the actions of the company. However, the directors are only there through the will of the shareholders collectively, and if their own pockets are affected, it may not be long before they take steps to have the directors removed.

The question of how to punish a company is one of many problems which must be overcome before criminalisation of corporate misconduct will proceed unaided. There is a huge wealth of political and social issues, which must first be addressed, and yet any decision at the end of the day will inevitably be a politically or socially motivated one.

### ***Access to information***

For a successful prosecution, access to information would require to be extremely efficient, such information though would most probably be of an extremely sensitive nature, for example, information on the nature of the business, its competitors, investors, share prices, financial information and so on. Many people object to moves which open companies up to more scrutiny and such attempts to make it easier to search a company's non-public records would be unwelcome in business circles.

Another unwelcome and related possibility is the prospect that the lawyer-client or accountant-client relationships could become more strained. This could happen in two ways, firstly, in relation to searching a company's offices, their lawyers and accountants may also be subjected to police searches which unless handled extremely carefully, would result in other clients, or potential clients becoming concerned about the status of their own affairs.<sup>19</sup>

Secondly, and possibly more concerning for clients of law and accountancy firms is the notion that lawyers and accountants are frequently tools of corporate misconduct.<sup>20</sup> It has consequently been proposed that they play a more active role in the monitoring of their clients and report suspicious actions to the appropriate authorities. It is alleged that the majority of corporate lawyers do not report

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<sup>19</sup> In a recent article in *The Lawyer*, "Not-so-private investigations" by Grania Langdon-Down, 11/02/97, the prospect of solicitors' offices being bugged by the police and other government agencies during the course of investigations is alarmingly portrayed not as a possibility but an inevitable probability in the future.

any suspicious activities of their clients for fear of losing business but in defence, some claim that lawyers are not trained to know what they should be looking for.

The fact that greater disclosure by companies, tighter financial regulation and the possibility of monitoring of lawyers and accountants remain very unpopular among companies and their supporters remains a huge barrier to the criminalisation of corporate misconduct.

Recent developments though in human rights legislation both North and South of the border mean that according to Laura Cox QC,

*“corporate lawyers will also be affected because corporations have human rights too.”*

This she claims is important as,

*“increasing levels of regulation of financial and other markets ... penetrate ever more deeply into the affairs of both individuals and corporations”<sup>21</sup>*

As human rights legislation already exists in Scotland and England and Wales will shortly follow, the effects in a corporate context could be widespread and may serve to counter any advances in access to information. Either way, this hurdle will cause many difficulties in attempting to prosecute a company.

### ***Parties impeding criminalisation***

While it seems logical that corporations should be held criminally responsible and accountable for their actions, the barriers or impediments to this have certainly blocked the way so far. Several parties may well be to blame for this through their acts, omissions or general beliefs.

The Government is responsible through the Attorney General in England and the Lord Advocate in Scotland for prosecuting crimes. In some respects, this is an advantage of the criminalisation since justice would be more easily served through an expensive court action paid for by the State rather than remaining in private, often poorer citizens' hands. The cost of a lengthy court battle against a huge multinational corporation can act as a huge deterrent to even the most wealthy of persons. In practice though, this only serves as an advantage if a prosecution is in fact raised. In the absence of this, private citizens are left to their own devices. It could be argued that the government does not wish to intervene, feels it should not intervene or is simply neglecting this area of law. This can be shown through the fact that there have been very few prosecutions for corporate crimes over the years.<sup>22</sup>

Legislation, particularly the Health and Safety at Work Act 1974, while enabling prosecutions of companies, has resulted in very few, and even in the framing of the legislation, conveys the image that

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<sup>20</sup> “Coming clean on money laundering” The Lawyer – 30/08/99

<sup>21</sup> “Take a step in the rights direction” Laura Cox QC The Lawyer – 22/11/99

<sup>22</sup> Only one prosecution for Corporate Manslaughter – Kite and Ors The Independent, 9/12/94

crimes in the workplace are not quite the same as crimes committed by individuals. A more pronounced problem is the way in which accidents are dealt with. The Health and Safety Executive is a Government regulatory body and has power to investigate all such matters relating to health and safety in the UK. It is not though, a branch of the police and as such may neglect to treat matters in a criminal fashion. The police in turn will leave matters to be dealt with by the Health and Safety Executive and a criminal prosecution may never arise.

The Government's own views on the benefits of corporations to the national economy may have served to halt prosecutions. James Gobert believes that the Government is loathe to compromise its' own financial position by condemning corporate activities due to its main concern that an over regulatory commercial environment will both deter inward investment and drive out existing corporations. The merit in this argument has yet to be seen, although increasingly, companies are prepared to move to different countries for tax and regulatory reasons. It would seem difficult for a company to justify moving because they couldn't commit murder under one particular jurisdiction's laws.

The public and the media convey the image that a death in the workplace is an accident and neglect to demand justice or attribute blame save only in the most severe of circumstances. Few people would expect food poisoning from a restaurant to be dealt with in a criminal manner even if such was the result of an apparent and obvious disregard for food hygiene standards in the establishment. Yet an individual would automatically be blamed in the same circumstances. Companies too are unlikely to report that a death in their own workplace was as a result of their own operational failings and instead prefer to refer to such incidents as "accidents" which in turn is lapped up by the media.

## **Conclusion**

As 'accidents' in the workplace become alarmingly more common place than ever before, a drive towards changes in the criminal system may seem inevitable but as has been illustrated above, may be blocked at every turn by barriers both practical and artificial. The barriers which may cause the most problems are those which revolve around finding a clear cut response to the issue of how to approach the problem, however, differences between the many UK legal systems are unlikely to create any more than minor difficulties in the long run. None of the barriers though have a sufficient degree of permanency as would warrant giving up hope for change. In the meantime unfortunately, although the question is an extremely politically motivated one, in order to effect any change, another major disaster may yet be required.

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